

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7017

United States Court of Appeals

FOR THE SECOND CIRCUIT

PETER RUFFINO,

Plaintiff-Appellant,

—against—

SCINDIA STEAM NAVIGATION CO., LTD.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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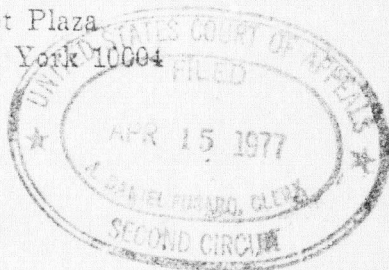


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BRIEF FOR DEFENDANT-APPELLEE

Statement

This is an action brought by a longshoreman employee of Pittston Stevedoring Corporation to recover damages for personal injuries allegedly sustained by him on January 29, 1974, while working on board the m/v Jalajyoti in Brooklyn, New York. At that time, the longshoremen were discharging, among other things, skids of tea and rolled rugs. This action was brought against the owner of the m/v Jalajyoti, Scindia Steam Navigation Co., Ltd. (hereinafter referred to as the shipowner).

This case was tried before the Honorable Lee P. Gagliardi with a jury from October 12-15, 1976 (2a). At the end of the plaintiff's case, the shipowner moved to dismiss the complaint for failure to establish a *prima facie* case

of negligence (152a, 153a). The shipowner again moved at the close of all the evidence for a directed verdict in the shipowner's favor (303a, 304a). The Trial Court reserved decision on both motions (153a, 304a). At the end of the trial, the jury returned a verdict for the plaintiff in the amount of \$60,000 (2a). On October 20, 1976, the shipowner moved for a directed verdict and for judgment notwithstanding the verdict (329a). Thereafter, on October 26, 1976, the Clerk of the District Court entered Judgment No. 76941 in favor of the plaintiff against the shipowner in the amount of \$60,000 (2a).

The shipowner took the position in its trial and post-trial motions that the plaintiff had failed to present evidence sufficient to allow the jury to make a finding of negligence; that plaintiff had failed to establish any duty on the part of the shipowner to supervise the cargo operations or any custom and practice probative of a standard of care that the shipowner could have allegedly violated; that there was no evidence at the trial from which the jury could have drawn an inference that the shipowner had either actual or constructive notice of an alleged defect in the cargo stow (152a, 153a, 303a, 304a, 329-338a). In his decision of November 30, 1976, the Trial Judge held that there was no testimony presented at the trial which would permit an inference that the shipowner had any notice, actual or constructive, of the claimed defect as alleged in the complaint (350a). Accordingly, he granted the defendant's motion for a directed verdict and ordered that judgment be entered notwithstanding the verdict in favor of the shipowner (350a). On December 10, 1976, an order and judgment was entered vacating the judgment in favor of the plaintiff and dismissing the complaint of the plaintiff (351a). It is solely from this decision, order and judgment that the plaintiff appeals (3a).

The sole issue presented on this appeal then is whether the Trial Judge erred in granting a directed verdict and entering judgment notwithstanding the jury verdict in favor of the shipowner.

The Evidence at Trial

According to plaintiff, he and his fellow longshoremen boarded the m/v Jalajyoti and proceeded to the No. 6 hatch at approximately 8:10 or 8:15 a.m. (4a, 5a). After the ship's crew had opened the hatch, plaintiff's longshore gang descended into the upper tween deck at approximately 8:30 a.m. (6a). Plaintiff maintained that the hatch square and inshore wing of No. 6 upper tween deck was stowed with cases of tea strapped on skids (8a-12a). According to plaintiff, on top of the skids of tea in the inshore wing rolls of rugs were stowed five or six high to a height of approximately three feet (8a, 12a). In discharging the rolled rugs plaintiff and his partner climbed atop the stow to hand rugs down to other longshoremen who placed them in rope slings (12a, 13a).

Plaintiff alleged that while he and his partner were handing down rolled rugs to the other longshoremen, he backed up to position himself (14a, 59a). When he did so, a rolled rug allegedly bent underneath him and his left foot sank into a claimed hole in the stow. The rug and plaintiff's foot went down (15a, 59a, 60a). Both plaintiff and his partner testified that they did not see any hole in the stow before plaintiff's accident (15a, 19a, 100a, 113a). Plaintiff testified that he fell into a three or four foot wide space between the stow and the skin of the ship (48a, 49a). However, plaintiff's partner, who claimed to have seen the hole after the accident, described the hole in the stow as approximately three to four feet in diameter and five to six feet deep and entirely surrounded by cases of tea (102a,

103a). The additional claim was made that the skids of tea were stowed with spaces between them and with no dunnage or plywood placed on top of the tea to serve as a flooring beneath the rug stowage (18a, 102a, 103a).

Plaintiff admitted that no ship's officers or crew members were present in the hatch before or at the time of his accident (51a). However, his partner insisted on cross-examination that the Chief Officer was in the hatch when the accident occurred (110a, 111a). The vessel's Chief Officer denied this allegation (221a). Whether the Chief Officer was present in the hatch is irrelevant to this appeal because both plaintiff and his partner who were working atop the stow testified to their inability to detect the hole prior to the accident (15a, 19a, 100a, 113a). Obviously, had the Chief Officer been present in the hatch, he could not have observed the claimed defect either.

The cargo stow in the No. 6 upper tween deck on the date in question included condiments stowed against the forward bulkhead (177a). In addition, a few skids of tea and ninety-six rolled carpets were stowed fore and aft in the forward part of the hatch square. In the after part of the hatch square outport cargo was stowed (190a, 193a). The skids of tea measured four feet by four feet and contained approximately 16 chests of tea per skid (195a).

The skids of tea and rolled rugs in No. 6 upper tween deck had been loaded in Calcutta, India by employees of an expert independent stevedore under the direct supervision of stevedore personnel (200a-202a, 203a). The ship's officers had nothing to do with the stevedore methods employed in the loading (202a); they did not determine how many longshoremen worked in a particular hatch (202a); they did not tell the longshoremen what gear to use (202a); nor did they assist in any way in cargo operations (202a-203a). It was the normal and customary practice in Cal-

cutta for the loading stevedore to lay a floor of plywood or dunnage on top of the skids of tea before loading rolled rugs (261-263a). Plywood or dunnage as needed was laid by the loading stevedore and an independent contractor supplied the dunnage in Calcutta (263a). It was not the duty of ship's officers to see that this was done (255a). However, during loading operations in Calcutta, two ship's officers were assigned to cargo watches (213a). These officers periodically made the rounds of the ship during loading, although not at any fixed times (213a-214a). They were at liberty to leave the deck for tea and lunch. It was thus not a continuous watch on deck (214a). While on watch, these officers checked periodically to ascertain whether the cargo was placed in conformity with the cargo stow plan, to note stevedore damage, to conduct a fire watch and to check the vessel's moorings and gangway (211a, 212a). The Chief Officer received no complaints or reports of complaints of improper stowage from anyone during the loading operation (216a).

While enroute from Calcutta to New York, a general inspection of the cargo hatches was made every two or three days (217a). These inspections disclosed no evidence that the cargo had shifted (217a).

Following the vessel's arrival in New York Pittston Stevedoring Corporation, an expert independent contractor, discharged her cargo. Again, the ship's officers and crew did not assist in the cargo operations (220a) nor did they supervise the longshoremen in their work (220a). The stevedoring experts called by both sides were in agreement that by custom and practice it was the duty of the expert stevedore to supervise the discharge in order to make sure the work was properly performed under safe working conditions (125a, 282a, 283a). Furthermore, the evidence was uncontradicted that good practice requires

the expert stevedore to provide, create and maintain safe and proper working and walking conditions (282a). Where necessary, the stevedore's longshoremen employees are required to provide plywood or construct a suitable and safe walking or working area (282a). The necessity for such construction is determined by the expert stevedore's personnel who have the immediate supervision (282a).

Significantly, during the vessel's stay in New York, her Chief Officer received no complaints or reports of complaints of improper stowage (221a). He emphatically denied witnessing plaintiff's alleged accident or receiving any report of it (221a).

Thus, the evidence in this case presents a claim of a defect in a cargo stow created by an expert independent loading stevedore in India. Clearly, the alleged absence of dunnage and hole in the stow, in the context of this case, would constitute a claim of a latent defect (153a, 154a). Plaintiff's counsel conceded below that the plaintiff's claim of negligence was predicated solely on the shipowner's constructive notice of the alleged latent defect (122a).

POINT I

The shipowner owed plaintiff no non-delegable duty to provide a safe place to work.

Through the November 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act Congress and the Courts have laid to rest the old doctrine of unseaworthiness and the even older doctrine of a duty on the part of the shipowner to provide a longshoreman with a safe place to work.

The Longshoremen's and Harbor Workers' Compensation Act (LHWCA) Amendments of 1972, effective November 26, 1972, 86 STAT. 1251, 33 U.S.C. §905 (1972) provide as follows:

"Sec. 5(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon

the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act."

The Senate and House Committees added the following comments concerning Section 5(b) personal injury actions:

" * * * The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position 'vis a vis' his rights against the vessel as a third-party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third-party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third-party in non-maritime suits liable under similar circumstances."

Senate Committee Report No. 92-1125; 92nd Cong., 2nd Session, 1972.

"The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in a non-maritime employment ashore, insofar as bringing a third-party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness', 'nondelegable duty,' or the like."

"Persons to whom compensation is payable under the Act retain the right to recover damages of negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-

enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act * * *"

House Committee Report No. 92-1441; 92nd Cong., 2nd Sess., 1972.

It is axiomatic that "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." *Southern Pacific v. Jensen*, 244 U.S. 205, 215 (1917). This Congress has done with the 1972 Amendments, and its intent has been implemented by this and other courts.

The first of these decisions were *Lucas v. Brinkness Schiffarts Ges.*, 379 F. Supp. 759 (E.D. Pa. 1974) and *Landon v. Leif Hoegh & Co., Inc.*, 521 F.2d 756 (2d Cir. 1975). Later, the Courts of Appeals recognized in specific language the abolition of the non-delegable duty of the shipowner to provide longshoremen with a safe place to work. First, in *Bess v. Agromar Line*, 518 F.2d 738 (4th Cir. 1975), the court, in affirming the involuntary dismissal of the plaintiff's claim alleging failure to provide dunnage, stated that the Amendments "preclude an action based upon a non-delegable duty to provide a safe place to work or a breach thereof." Secondly, in *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976), this Court, although dealing with an open and obvious condition known to the shipowner-stevedore and inapposite to this case, clearly stated that the 1972 Amendments "eliminated the concept of a non-delegable duty to provide a safe place to work." 536 F.2d 507.

More recently, the intent of Congress was found to be persuasive by the Third Circuit in *Brown v. Ivarans Rederi A/S*, 545 F.2d 854 (3d Cir. 1976), where it was rec-

ognized that "for reasons of policy the major responsibility for the proper and safe conduct of the work was to be borne by the stevedore." In *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757 (4th Cir. 1976), the Fourth Circuit recognized that "the 1972 Amendments eliminated the absolute non-delegable duty to provide longshoremen a safe place to work." 540 F.2d 758. Finally, the Fifth Circuit in *Gay v. Ocean Transport*, — F.2d — (5th Cir. Docket Nos. 75/2729 and 75/2441, decided February 1, 1977), recognized that the 1972 Amendments required dismissal where:

"[P]laintiff's argument is, in effect, that the vessel has a non-delegable duty to provide a longshoreman with a safe place to work. But this is exactly the type of liability without fault concept from which Congress sought to free vessels by the passage of the 1972 Amendments."¹

¹ See also the district court opinions in *Cummings v. "Sidarma" Soc.*, 409 F.Supp. 869 (E.D. La. 1976); *Solsvik v. Maremar Compania Naviera, S.A.*, 399 F.Supp. 712 (W.D. Wash. 1975); *Croshaw v. Koninklijke Nedlloyd, B.V. Rijswijk*, 398 F.Supp. 1224 (D. Or. 1975); *Frasca v. Prudential-Grace Lines, Inc.*, 394 F.Supp. 1092 (D. Md. 1975); *Fitzgerald v. Compania Naviera La Molinera*, 394 F.Supp. 413 (E.D. La. 1975); *Slaughter v. S.S. Ronde*, 390 F.Supp. 637 (S.D. Ga. 1974), *aff'd*, 509 F.2d 973 (5th Cir. 1975); *Birrer v. Flota Mercante Grancolombiana*, 386 F.Supp. 1105 (D. Or. 1974); *Ramirez v. Toko Kaiun K.K.*, 385 F.Supp. 644 (N.D. Cal. 1974); *Citizen v. M/V Triton*, 384 F.Supp. 198 (E.D. Tex. 1974); *Fedison v. Vessel Wislica*, 382 F.Supp. 4 (E.D. La. 1974); *Hite v. Maritime Overseas Corp.*, 380 F.Supp. 222 (E.D. Tex. 1974).

POINT II

Where there is a claim of a latent defect:

(a) Section 343 of the Restatement (Second) of Torts is only one element in the congeries of the respective duties of care owed by the longshoremen, stevedore and shipowner.

(b) The shipowner has no duty to monitor, inspect or supervise the work of expert independent stevedores either during loading or discharging.

Plaintiff's brief, Point I, attempts to erect §343 the Restatement (Second) of Torts as the standard of care with regard to claimed latent defects, without regard to any other considerations. However, §343 standing alone is a simplistic and inaccurate standard for the respective duties of care owed by longshoremen, stevedore and shipowner. As the Court of Appeals for the Fifth Circuit stated in *Gay v. Ocean Transport & Trading, Ltd.*, *supra*, Restatement (Second) of Torts §§342, 343 and 343A are "general standards [which] should be utilized in the future to assure uniformity in cases brought under §905(b) of the LHWCA to recover for injuries caused by the negligence of the vessel." Furthermore, as the Court of Appeals for the Third Circuit stated in *Brown v. Ivarans Rederi A/S*, *supra*:

"The parties in this case would have us suggest to the District Court the standard of care a vessel owes to a longshoreman under the negligence remedy created by §905(b). It would appear that the principles of the law of negligence as adopted in the admiralty field during the history of our country are to form the basis of any recovery against shipowners insofar as such principles are not inconsistent with §905(b). *See*,

e.g., *Kermarec, supra*, at 628; *Socony-Vacuum Co. v. Smith*, 305 U.S. 424, 431-32 (1939); *Jensen, supra*; see also, for example, *Bess v. Agromar Line*, 518 F.2d 738, 740-43 (4th Cir. 1975); §§281-83, as well as 302A, 305 and 452, Restatement (Second) of Torts, in light of the regulations set forth in note 3 and the text at pages 855-856 above." 545 F.2d 863.

An examination of the maritime law of negligence, pre-Amendments, quickly disposes of plaintiff's argument that the Trial Judge erred as a matter of law when he charged the jury that the shipowner has no duty to supervise any loading or discharging work performed by any stevedoring company or its employees. Such examination also disposes of plaintiff's claim that the shipowner had a duty to inspect for latent defects such as the one claimed here which was surrounded on all sides by cargo and could only be ascertained during the few minutes it would take to create and conceal it. As this Court stated in *Pisano v. Benny Skou*, 346 F.2d 993, 995 (2d Cir. 1965):

"The district court would have had to strain to find negligence in this case since the shipowner or its employees had no duty to inspect every knot in the rigging of every cargo boom aboard ship. At most a general inspection of conditions on board rather than minute continuous supervision of every detail entrusted to a responsible stevedoring firm was all that was needed to satisfy the duty of reasonable care under the circumstances."

However, the standard set forth in *Pisano* has been modified by the 1972 Amendments.

Another section of the Restatement (Second) of Torts which is particularly relevant to the case at bar is §409, which provides that:

"[T]he employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants."²

These general principles have been given more palpable form in a number of decisions under the 1972 Amendments to the Longshoremen and Harbor Worker's Act involving claims of hidden defects. In *Bess v. Agromar Line*, *supra* (cited with approval by this Court in *Napoli v. Hellenic Lines, Ltd.*, *supra*), the Court of Appeals for the Fourth Circuit affirmed the trial court's granting of defendant's motion for an involuntary dismissal with prejudice at the close of plaintiff's case. There, as here, plaintiff claimed a failure to provide dunnage as well as a failure to provide a safe place to work. The court found that the allegedly unsafe condition was the result of a loading process which was under the control of an expert independent stevedoring contractor. The court also found that the crew of the vessel and its owner were not aware of the allegedly unsafe condition and could not reasonably have learned of it.

² Most interestingly, §452 of the Restatement deals with a third person's failure to prevent harm as a superseding cause and provides as follows:

"(2) Where, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause."

The Court of Appeals for the Third Circuit in *Brown*, *supra*, indicated that §452 should be read in light of the Safety & Health Regulations for Longshoring set forth in footnote 3 to the opinion. 545 F.2d 863. The clear import of this part of the *Brown* decision is that, notwithstanding shipowner negligence, stevedore negligence by failure to observe good stevedoring practices or comply with the Safety & Health Regulations may, in a number of situations, operate to relieve the shipowner from liability by virtue of the stevedore's negligence being a superseding cause of the longshoreman employee's accident.

Again, in *Citizen v. M.V. Triton*, 384 F.Supp. 198 (E.D. Tex. 1974), the court entered judgment for the defendant shipowner and proceeded to state:

"It is clear, however, that Congress decided that the primary duty to provide a safe place to work is on the stevedore . . . The duty to discover and remedy a dangerous condition caused by the space between bags of flour as stowed was clearly the responsibility of the stevedore which had control of the work being done both in Galveston and Beaumont. The vessel cannot be negligent for the breach of duty owed by the stevedore." 384 F.Supp. at 201.

There, the court found that no evidence was offered showing that the shipowner had any knowledge of the condition of the alleged defective stow or the methods of loading or unloading at either port.

Also, in *Teoflovich v. D'Amico Mediterranean*, 415 F. Supp. 732 (C.D. Cal. 1976), the trial judge dismissed the plaintiff's action based upon alleged misalignment of dunnage. The court concluded that plaintiff had failed to carry his burden of proof in establishing that the vessel caused, actually knew of, or in the exercise of reasonable care should have known of, or had any responsibility for, the misalignment of the dunnage. The court found that plaintiff failed to introduce any evidence that the vessel's officers had a duty to inspect minute details of the stow placed in the vessel by a stevedore more expert than they; that he failed to prove that a defect in the dunnage existed before the vessel turned over control of the hatch to the stevedore. The court stated:

"Indeed, to impose upon the shipowner a nondelegable duty to inspect or correct the work of an independent contractor would reimpose upon the shipowner a type

of strict liability which Congress sought to abolish in the 1972 Amendments."

The court held that since plaintiff failed to prove that the vessel's officers knew of the existence of the alleged misaligned dunnage or had a duty to inspect for the condition, there was no showing of vessel negligence.

Similarly, in *Fedison v. Wislica*, 382 F.Supp. 4, 8 (E.D. La. 1974) the court held that:

"The duty to discover and remedy a dangerous condition caused by conditions in the stow was clearly one of the responsibilities of the stevedore . . . which had control over work being done in the hold. The vessel is not negligent for the breach of a duty owed by the stevedore."

Accord, *Slaughter v. S.S. Ronde*, 390 F.Supp. 637 (D. Ga. 1974), *aff'd* 509 F.2d 973 (5th Cir. 1975).

POINT III

The Trial Judge correctly ruled that there was insufficient evidence from which the jury could have drawn an inference of actual or constructive notice.

Under Rule 50(b) of the Federal Rules of Civil Procedure it has been held that the same standard obtains for entry of a directed verdict or judgment notwithstanding the verdict. *Neville Chem. Co. v. Union Carbide Corp.*, 422 F.2d 1205 (3d Cir. 1970); *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969). This Court succinctly framed the standard in *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970):

“Simply stated, it is whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict reasonable men could have reached.”

The shipowner must emphasize that the issue presented on this appeal is not whether there was *any* evidence supporting plaintiff's case but whether the jury could properly return a verdict for the plaintiff based upon the evidence presented at the trial of this case below. *Improvement Co. v. Munson*, 81 U.S. (14 Wall.) 442, 448 (1871); *Reitan v. Travelers Indem. Co.*, 267 F.2d 66 (7th Cir., 1959).

As this Court stated in *Stief v. J. A. Sexauer Mfg. Co.*, 380 F.2d 453, 461-62 (2d Cir. 1967), *cert. denied*, 389 U.S. 897:

“We must, when appropriate procedural demands have been made, determine at the outset of an action whether a possible liability of the defendant has been indicated by the plaintiff. This is a concept basic in

our jurisprudence. It is established, firmly and correctly, that if a defendant has violated no legal obligation, his liability for pecuniary damages must not be submitted to the possible prejudices, sympathies or whims of a lay jury. His basic liability is first to be tested as a matter of law by the judge," quoting *Jamieson v. Woodward & Lathrop*, 247 F.2d 20, 25-26 (D.C. Cir.), *cert. denied*, 355 U.S. 855 (1957).

The Court below, testing plaintiff's case as a matter of law, quite properly ruled that there was no evidence adduced at the trial from which the jury could have reasonably drawn an inference that the shipowner had any notice, actual or constructive, of the alleged defect which, it is claimed, caused plaintiff's accident. Such an inference "is legitimate only if the evidence offered makes the existence of the fact to be inferred more probable than the non-existence of the fact, and any lesser test would permit the jury to rest its verdict on speculation and conjecture." 9 *Wright & Miller, Federal Practice and Procedure* §2528 at 565; *Armstrong v. Commerce Tankers Corp.*, 311 F. Supp. 1236 (S.D.N.Y. 1969), *aff'd*, 423 F.2d 957 (2d Cir. 1970).

Even the simplistic statement in plaintiff's brief contains the requirement in §343 of the Restatement (Second) of Torts of actual or constructive notice. It is readily apparent from an objective and thorough analysis of the evidence presented at the trial of this case that the shipowner did indeed give up control of those parts and portions of the m/v *Jalajyoti*, including her hatches, which were incident to and necessary for the loading operation in India and the discharging operation in New York.

In his brief plaintiff's counsel attempts to somehow establish participation and supervision by the shipowner in

the loading and discharge by disorting the import of the Chief Officer's testimony and by quoting excerpts thereof out of context. Nowhere are these attempts more clearly illustrated than on page 18 of plaintiff's brief. There the clear implication of counsel's remarks is that the vessel's Chief Officer personally loaded all the cargo on the vessel. These attempts simply can not survive an objective scrutiny of the trial record.

Prior to commencement of loading, the Chief Officer drew up the cargo stow plan to indicate the location of each commodity (201a). The cargo was loaded in Calcutta by longshoremen employed by an expert independent contractor (200a). The ship's officers and crew had nothing to do with the loading methods, how many longshoremen were assigned to do the work, or what gear was used (202a). The ship's officers and crew did not assist in any way in the cargo operations (203a).

Laying a floor of plywood or dunnage was part of the stevedore's job (260a), and it was familiar with the procedure (263a). The stevedore would take the dunnage kept on deck abreast of No. 6 hatch (260a) and lay it as necessary (263a). It was not the ship's officers' duty to see that the longshoremen laid this dunnage (255a).

Although designated ship's officers were on watch on deck during loading operations (213a), their rounds were intermittent and made at no fixed times (213a, 214a). As previously stated, they sought conformity by the stevedore with the cargo stow plan. They attempted to observe and report any stevedore damage to cargo and the ship's gear. They also conducted a fire watch and made necessary checks of the vessel's mooring lines and gangway (211a, 212a).

The ship would, of course, have informed the contract stevedore of any known defect in the cargo stow (213a-

215a). However, the ship received no such notice of any defect, either directly or indirectly (213a).

Plaintiff's counsel has introduced a "red herring" into this case with his claim of shifting cargo during heavy weather. This claim of shifting has nothing whatsoever to do with this case. Plaintiff made no claim that his accident was caused by his tripping over a rug that had allegedly shifted in the No. 6 hatch. His claim is that he fell when a rug sank beneath him into a hole in the stow because no dunnage was laid beneath the rugs. This alleged defect was concealed by the cargo stow. The shipowner had no duty to discover this defect and no reasonable opportunity to do so.

If the defect in fact existed its certain detection by the shipowner would have required that a ship's officer be present in the hatch at all times to continuously monitor the expert independent loading stevedore doing his work. No such duty is imposed on the shipowner by the 1972 Amendments and, indeed, no such duty was imposed on the shipowner by pre-Amendment negligence standards. Furthermore, no evidence was adduced at the trial from which any inference could be drawn that despite the absence of a legal duty to do so, the shipowner did, in fact, continuously monitor the loading operation. Plaintiff's failure to establish actual or constructive notice of the alleged defect is fatal to his case.

CONCLUSION

The decision of the District Court granting a directed verdict and judgment notwithstanding the verdict in favor of the shipowner should be affirmed in its entirety.

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4/15/77

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